IN THE

Supreme Court of the United States

MAY 7 1
MICHAEL RODAK, J

October Term, 1973
No. 73-1607

HAWAIIAN AIRLINES, INC.,

Petitioner,

vs.

ALOHA AIRLINES, INC.,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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I

Relevant Proceedings Below.

The original complaint below was filed by Aloha Airlines, Inc. (Aloha) on July 3, 1972, seeking *only* damages pursuant to Section 4 of the Clayton Act (15 U.S.C. 15).[1] Aloha alleged that Hawaiian Airlines, Inc. (HAL) had, during the period 1968-1970, engaged in an attempt to monopolize inter-island air transportation in Hawaii in violation of Section 2 of the Sherman Act

[1]Section 4 of the Clayton Act (15 U.S.C. 15) provides in pertinent part:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(15 U.S.C. 2).[2] Aloha described with particularity seven acts which it alleged were undertaken by HAL "with the predatory intent and purpose of eliminating plaintiff as a viable competitor" and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff.

HAL correctly observes that the two most critical allegations upon which Aloha's case depends for viability and proof of damage are (1) the excessive scheduling of flights (which Aloha argues was the first blow intended by HAL to seriously weaken the plaintiff, thus forcing it into merger negotiations), and (2) the renunciation of a merger agreement (rapidly reaching fruition) *after* the CAB made clear to Hawaiian that it would approve Hawaiian's absorption of Aloha *only* with the expectation of later certificating another competitive carrier, thereby frustrating HAL's bid for total monopoly.

Petitioner moved to dismiss, or alternatively for summary judgment or judgment on the pleadings, relying predominantly on *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963). In a written decision filed on October 11, 1972 (349 F.Supp. 1064, Hawaii, 1972), Judge King concluded, after analyzing *Pan Am,* its ancestors and its progeny, that the Civil Aeronautics Board (CAB) did not have exclusive or primary jurisdiction of this case, stating that "HAL's reliance on *Pan Am,* as applied to the facts of this

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[2]Section 2 of the Sherman Act (15 U.S.C. 2) provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

case, is misplaced." (Petitioner's Appendix A, pp. i-ix) Judge King certified that ruling for Ninth Circuit review under 28 U.S.C. 1292(b), but the Court of Appeals for the Ninth Circuit, in the exercise of its discretion vested under that statute, declined review.

On January 10, 1973, this Court decided *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), and on January 24, 1973, petitioner moved again for summary disposition, relying on *Hughes* and this Court's decision of January 9, 1973, in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). On February 16, 1973, Judge King denied each of HAL's motions. (58 F.R.D. 429, Hawaii, 1973; Petitioner's Appendix A, pp. xiv-xxi.) In ruling that *Hughes* did not permit or authorize dismissal of the pending claim, Judge King stated the issue with remarkable simplicity:

> "HAWAIIAN reads *Hughes Tool Co.* as holding that all acts that could be the subject of a CAB order are immunized from the operation of the antitrust laws. ALOHA reads *Hughes Tool Co.* as holding that only acts which have been approved, authorized or required by a valid CAB order are so immunized."

Equally clear was Judge King's decision:

> "I agree with Aloha's interpretation of the [*Hughes*] case."

In this case, Judge King observed, there was "no claim that any of Hawaiian's acts of which Aloha complains were done pursuant to a valid CAB order."

On February 22, 1973, Judge King again certified the issue under 28 U.S.C. 1292(b), and on March 30, 1973, the Ninth Circuit granted review. On November

29, 1973, the Ninth Circuit, in a decision written by Judge Tuttle of the Fifth Circuit, setting by designation, affirmed Judge King on all issues. (489 F.2d 203, 9th Cir., 1973.)

Subsequent to its November 29, 1973 decision, the Ninth Circuit, after petitioner unsuccessfully sought rehearing or a hearing *en banc* (Appendix C), and upon being duly informed that the District Judge had set a date for the termination of discovery, for pre-trial and trial, declined to stay its mandate. Accordingly, discovery is proceeding forward and is soon scheduled to terminate under an existing pre-trial order issued by Judge King. Jury trial is set to begin in Honolulu on January 6, 1975.

II
Issues Presented.

The principal issue presented is whether this Court's decision in *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973) or its earlier decision in *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963) or both, immunize from the operation of the antitrust laws the conduct charged by plaintiff below as constituting an attempt to monopolize the air transportation of persons, property and mail among and between the several islands of the State of Hawaii, even though the specific acts which constitute the basis of Aloha's treble damage complaint were not in fact, and could not have been, approved, authorized or required by an order of the Civil Aeronautics Board (CAB) and even though the CAB expressly condemned the conduct of HAL.

Other issues presented in the Petition are (1) whether the doctrine of primary jurisdiction as enunciated in

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) is applicable here; (2) whether the CAB, in awarding a subsidy to Aloha under the provisions of 49 U.S.C. 1376(b)[3] (Section 406(b) of the Federal Aviation Act of 1958) has to that extent precluded Aloha from seeking damages from HAL, and (3) whether that portion of Aloha's complaint which charges HAL with opposing Aloha's subsidy request before the CAB with "the predatory intent and purpose of eliminating plaintiff as a viable competitor . . ." and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff . . ." should be stricken because these allegations are not within this Court's interpretation in *California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972) of the "sham" exception to the doctrine enunciated in *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523 (1961).

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[3]Section 406 (49 U.S.C. 1376) provides in pertinent part:

"Rates for transportation of mail—Authorization to fix rates.

(a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith . . .

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors . . . (3) *the need of each such air carrier* (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, togtether with all other revenue of the air carrier, to enable such air carrier under hon-

(This footnote is continued on next page)

III

Argument.

A. Exclusive Jurisdiction by Express Repeal.

Petitioner's argument that *Hughes* repeals the antitrust laws in the aviation industry to the extent that the matter which is the basis of the antitrust complaint could in any way be investigated or regulated by the CAB is, as the Ninth Circuit correctly observed, an unwarranted extension of the relatively narrow holding in that case. *Hughes* did no more than hold that acts which were *specifically approved, authorized and required* by valid CAB orders under Section 408 of the Federal Aviation Act of 1958, were immunized from the operation of the antitrust laws by reason of Section 414 of that Act (49 U.S.C.A. 1384).[4]

Hughes, therefore, was a case in which this Court found an *express* repeal of the antitrust laws by reason of the implementation of immunizing legislation. Here, as the Court of Appeals for the Ninth Circuit observed, "there is no order of the CAB authorizing the conduct which has been made the basis of the antitrust complaint filed by Aloha." (489 F.2d at 208.) But at least of equal importance is the fact that "the CAB

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est, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

[4]Section 414 (49 U.S.C. 1384) provides:

"Any person affected by any order made under Sections 1378, 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' as designated in Section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

could in no event have authorized by order the conduct which has here been made the basis of the antitrust action." (489 F.2d at 211).

There is no arguable basis for contending that *Hughes* controls or applies in these circumstances. The Court of Appeals here did no more than correctly decline to extend the limited dispensation of antitrust immunity which had been authorized by *Hughes*.

B. Exclusive Jurisdiction by Implied Repeal.

Equally untenable is petitioner's argument that in this case the repeal by implication doctrine articulated in *Pan Am* is applicable. This Court held in *Pan Am* that the antitrust laws were displaced where an antitrust complaint sought prospective injunctive relief in a case which arose out of the acquisition of control of a CAB regulated air carrier and a consequent agreement to divide routes, two subjects which, under the Federal Aviation Act of 1958 (and its predecessor, the Civil Aeronautics Act of 1938), were "*specifically entrusted*" to the regulatory expertise of the CAB. The Ninth Circuit correctly analyzed *Pan Am* by stating that it is *only* those matters "normally thought of as antitrust problems" that are "*expressly entrusted* to the CAB [which] are withdrawn from consideration by the courts." 489 F.2d 206, quoting from *Pan Am*, 371 U.S. at 304, 305 (emphasis added). The Court of Appeals for the Ninth Circuit thus concurred in an historical interpretation of *Pan Am* by the Second Circuit, the only other circuit which was confronted with the issue for decision. See *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 411 (2nd Cir., 1968) and *Breen Airfreight Limited v. Air Cargo, Inc.*, 470 F.2d 767 (2nd Cir., 1972).

Petitioner's argument in support of its implied repeal/exclusive jurisdiction contention is set out in the opinion of the Court below:

> "Hal takes the position, however, that the fact that Section 411 of the Act provides that the Board may, upon its own initiative or upon complaint by any air carrier, investigate and determine whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation and if it should find the existence of such practices, it shall issue a cease and desist order, amounts to an explicit commitment of exclusive authority to the Board to deal in all aspects with charges of unfair competition." 489 F.2d at 208.

The Court below properly rejected that contention. The difficulty with petitioner's analysis is that it would amount to a *total* repeal of the antitrust laws because there is virtually no controversy which the Board could not investigate under its Section 411 powers.[5]

The key to the *Pan Am* immunity lies not in the ability of the Board to have conducted an investigation, nor in its power to issue appropriate cease and desist

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[5]Section 411 (49 U.S.C. 1381) provides:

> "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier or ticket agent to cease and desist from such practices or methods of competition."

orders, but in respect to the *subject matter* of the inquiry. Unless the subject matter is one "specifically entrusted" to the agency's regulatory expertise, no implied immunity exists because no conflict between the CAB and the antitrust court could develop. And, of course, it is that potential conflict on which the implied repeal rule of *Pan Am* was predicated.

Here, however, by reason of 49 U.S.C. 1371(e)(4),[6] the CAB has been expressly deprived of authority to regulate scheduling. Thus, we have a situation where the critical subject matter of the antitrust lawsuit is one which not only has not been "specifically entrusted" to the regulatory expertise of the CAB, but one which the CAB has been *expressly prohibited* from regulating by an Act of Congress. And it is not seriously urged that Hal's *renunciation* of the merger agreement is a matter "specifically entrusted" to the CAB.

Nothing could be clearer from *Hughes* than the twice repeated and thus particularly emphasized quotation: "the Federal Aviation Act does not completely displace the antitrust laws." (93 S.Ct. 661; restated at 93 S.Ct. 661-62). And as part of footnote 14 this Court said:

> "The Pan American case is consistent with the view expressed in *Silver v. New York Stock Exchange,* 373 U.S. 341, 360-361, 83 S. Ct. 1246, 1258-1259, 10 L. Ed. 2d 389, that while a statu-

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[6] 49 U.S.C. 1371(e)(4) provides:

"(4) No term, condition, or limitation of a certificate shall restrict the fight of an air carrier to add or to change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d) (3) of this section." (Emphasis supplied).

> tory scheme that does not create a total exception from antitrust laws may, nonetheless, *in particular and discrete instances by implication grant immunity from an antitrust claim.*" (93 S.Ct. 660; emphasis supplied).

In these circumstances the Ninth Circuit, reading *Hughes* and *Pan Am* as an interlacing test, properly discerned that there had been no repeal by implication with respect to the subject matter of this case.

C. Primary Jurisdiction.

Petitioner fails to set forth with clarity or specificity which it is that the CAB should now be called upon to deal with contentions which, from its regulatory viewpoint, are moot and as to which it has already made full factual findings based on a massive record.[7] The Ninth Circuit opinion emphasizes that the CAB dealt with the question of uneconomic overscheduling of flights in the context of the subsidy proceeding and that it has made factual determinations in that proceeding which bear upon the subject matter (but clearly are not

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[7]The District Court, applying *United States v. Utah Construction and Mining Co.*, 384 U.S. 395 (1966), has already determined, after full briefing and oral argument, that the principles of collateral estoppel are applicable to certain of those findings pertinent to the antitrust issues. Judge King declined to certify that ruling under 28 U.S.C. 1292(b). HAL sought a writ of mandamus. The Ninth Circuit Court of Appeals, after requiring an extensive reply directed principally to the question of whether the proceedings before the CAB were indeed adversary so as to insure that HAL had the benefit of the due process requirements of which that Court spoke in *Paramount Transport Systems v. Chauffers, Teamsters and Helpers Local No. 150, et al.*, 436 F.2d 1064 (9th Cir., 1971), issued an Order on June 12, 1973 in which, apparently on the merits, the Order recited "Writ Denied".

dispositive) of the antitrust suit. As expressed by Judge Tuttle, "it is difficult to understand precisely what the appellant considers should now be remanded to the Board for further consideration . . . 489 F.2d at 211. Patently "the CAB could in no event have authorized by order the conduct which has here been made the basis of the antitrust action." (*id.*) In circumstances where "the CAB had done its full task with respect to the matters that are now being urged in the antitrust action." (*id.*), and where "the CAB here has already dealt to the full extent of its ability with the matters at issue" (489 F.2d at 212) it is, as the Court of Appeals held, clear that:

> "there is nothing further to be remanded to it [the CAB] even though the principle of primary jurisdiction were to apply. It has already determined that Aloha was injured by uneconomical overscheduling by HAL. It has no authority under Section 411 to make any inquiry or find any facts with respect to the existence of 'predatory intent' or purpose to eliminate or destroy Aloha. Nothing else the Board could do would make unnecessary the fact finding in the antitrust suit by the District Court." (489 F.2d at 212).

It is perfectly evident that the Court below, in citing and distinguishing *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973) properly applied the principles established by this Court in that case. There is, therefore, no need for this Court—at least in this case—to be burdened with a reexamination of the question of primary jurisdiction on which it has spoken so recently with clarity.

D. Election of Remedies.

Petitioner's argument that Aloha is estopped to seek damages caused by the overscheduling during the subsidy period because it earlier sought and secured a subsidy award from the Civil Aeronautics Board under the provisions of 49 U.S.C. 1376(a) and (b) is morally bankrupt. For an adjudicated wrongdoer to argue that its victim has waived its right to seek recompense by reason of a mechanism under which the government, out of taxpayer funds, has undertaken to assist the carrier through a critical financial period for the purpose of preserving an effective system of air transportation in the national interest, is to suggest that this petitioner should be free to violate the law with total impunity. The Ninth Circuit forcefully rejected this argument—even though it was not within the grant of their 1292(b) review—probably (we speculate) because the argument is offensive to judicial sensibilities. The Court below said:

> "The treatment of this claim by the Board in this case, together with a careful reading of the Act itself, makes it plain that the awarding of a subsidy is in no sense intended to compensate one competing carrier for losses inflicted upon it by unfair trade practices committed by another. The subsidy provisions are merely a stopgag to assist a carrier, whose continued existence is recognized to be in the public interest by the Board, to keep its head above water so long as its failure to do so is not the result of its own dishonest, uneconomical or inefficient management. It is to be noted that it has nothing to do with the reimbursement of lost profits which might otherwise have been legally earned by the injured carrier which,

under the antitrust laws is not held to the strict accountability of stringent economy and competence of management required of applicants for subsidies."

* * *

"Under Aloha's certificate to operate in the State of Hawaii it would, in fact, be remiss if it did not apply for a subsidy to see it through a period of such losses as would threaten its viability as a carrier. Since such subsidies are measured by the amount which is necessary when added to 'all other revenue of the air carrier . . . to maintain air transportation to the extent and the character and quality required for the commerce of the United States, the Postal Service, and the national defense,' it is clear that such subsidy is no measure of anticipated profits which might be recoverable in an antitrust action. Neither, therefore, can the provision of subsidies be considered as a substitute for damages that may be owed to a carrier either for the period of the subsidy itself or the presubsidy or postsubsidy periods included within an antitrust action." (489 F.2d 209-210).

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) on which petitioner relies is totally distinguishable and presents no conflict requiring decision by this Court. When Chief Justice Warren spoke of a choice between the antitrust suit and reparations before the Federal Maritime Commission, he did so in a context in which the Shipping Act authorized the Federal Maritime Commission to award "reparations" *to be paid by the guilty party directly to its victim.* In short, the Federal Maritime Commission, as distin-

guished from the CAB, has been expressly empowered by Congress to make damage awards called "reparations." In *Carnation,* the plaintiff sought *both* reparations and treble damages which obviously would have resulted in at least duplicative recovery. This Court simply said that *Carnation* must make an election as between seeking reparations from the defendants before the Board or seeking treble damages from the defendant in the antitrust suit. At no time was there an intimation that taxpayer funds, awarded for reasons justified by the national interest, constitute a substitute for seeking compensation from the wrongdoer.

E. The "Noerr Issue" Is Not Ripe for Review.

Petitioner's question No. 5 was not within the scope of the Ninth Circuit's 1292(b) grant and is not ripe for review here. In the complaint below Aloha alleged that petitioner's opposition to Aloha's request for subsidy before the CAB was "sham" within the meaning of *Eastern Railroad Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961), as further refined in *California Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). The District Court denied a motion to dismiss or strike these allegations at the pleading stage. The Court below in its opinion said that this matter "need not now be dealt with since the interlocutory appeal was merely from the denial by the trial court of motions to dismiss the complaint or for summary judgment or judgment on the pleadings . . . All other matters [including this issue] with which the trial court dealt, are still at an interlocutory stage, and will be subject to further orders of that Court as the record may develop." (489 F.2d at 212). Because the "Noerr issue" may or may not be presented as part of the ul-

timate contentions advanced at trial by Aloha, it is premature for this Court to concern itself with the denial of the motion to strike those allegations.

IV

Conclusion.

The case presented by petitioner does not fall within the guidelines established by Rule 19 of the Supreme Court Rules, nor does it present issues of special significance. Indeed, in three cases in 1973 (*Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 [1973]; *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 [1973] and *Otter Tail v. United States*, 410 U.S. 366 [1973]) this Court has dealt with exclusive and primary jurisdiction questions in antitrust cases involving regulated industries. That body of law is now in the process of being analyzed and applied by lower courts throughout the country. This case is a perfect illustration of a Court of Appeals engaged in careful, precise and, we submit, correct analysis and application of those principles. Finally, the Antitrust Section of the American Bar Association devoted most of its Spring 1974 meeting to analysis and alignment of these decisions. This subject matter does not now require this Court's attention. For these reasons we respectfully urge that the Court deny the Petition for Writ of Certiorari.

Dated: May 6, 1974.

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